



UNITED STATES DEPARTMENT OF COMMERCE  
The Under Secretary of Commerce  
for Oceans and Atmosphere  
Washington, D.C. 20230

OCT 31 2005

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Eugene A. Wimpee  
6425 Cottage Hill Road  
Mobile, AL 36695

J. Scott Brown, Chief  
Coastal/Facility Section  
Alabama Department of Environmental Management  
Mobile Branch  
2204 Penmeier Road  
Mobile, AL 36815

Re: Dismissal of the Consistency Appeal of Eugene A. Wimpee

Dear Messrs. Wimpee and Brown:

This consistency appeal arises from a permit application Eugene A. Wimpee (Mr. Wimpee) filed with the U.S. Army Corps of Engineers (Corps), seeking authorization to fill approximately 0.38 acres of forested wetlands in Baldwin County, Alabama. Pursuant to the Coastal Zone Management Act (CZMA), the Corps requested that the Alabama Department of Environmental Management (Alabama or State) determine the project's consistency with the State's coastal management program. Alabama initially objected to the project as inconsistent with portions of its program, prompting this appeal by Mr. Wimpee. Alabama subsequently withdrew its objection, and the Corps recommenced processing the permit application. The Corps was unable to obtain sufficient information regarding the purpose and need for the project, however, and therefore cancelled the application. As there is no longer an active permit application or a pending State objection to the project, Mr. Wimpee's appeal is dismissed as moot.

**I. Statutory and Regulatory Background**

The CZMA provides states with federally-approved coastal management programs the opportunity to review proposed projects requiring federal licenses or permits if the project will affect the state's coastal zone. A timely objection raised by a state precludes federal agencies from issuing licenses or permits for the project, unless the Secretary of Commerce overrides the objection. The Secretary may override a state's objection upon appeal by the license or permit applicant. 16 U.S.C. § 1456(c)(3)(A).



Regulations implementing the CZMA provide the Secretary may dismiss a consistency appeal for “good cause.” 15 C.F.R. § 930.129(a) (2005).<sup>1</sup> Under prior decisions, the phrase “good cause” has been interpreted to include instances where an appeal became moot as a result of subsequent events.<sup>2</sup> Once an appeal has been dismissed because a State has removed its objection, the project may receive licenses and permits from federal agencies.

## **II. Factual Background**

The project at issue involves filling approximately 0.38 acres of forested wetlands located on property owned by Mr. Wimpee, for purposes of constructing a road approximately 1000 feet long and 15 feet wide. The wetlands are located adjacent to Weeks Bay in Baldwin County, Alabama. The stated purpose of the project was to create a road providing access to harvest trees, and possibly to provide access to an on-site residential structure.

Prior to receiving authorization from the Corps, Mr. Wimpee began his project, partially filling and grading 700 feet of road. In response, the Corps issued Mr. Wimpee a Cease and Desist Order. Mr. Wimpee subsequently applied for an after-the-fact permit from the Corps, required under section 404 of the Clean Water Act.<sup>3</sup> Pursuant to the CZMA, the Corps requested that Alabama determine whether Mr. Wimpee’s project was consistent with the State’s coastal management program.<sup>4</sup> Alabama objected to the fill of these wetlands as inconsistent with its coastal management program.<sup>5</sup> Based on the State’s action, the Corps denied Mr. Wimpee’s permit application without prejudice.<sup>6</sup> Mr. Wimpee then filed this appeal with the Department of Commerce on June 24, 2003.<sup>7</sup>

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<sup>1</sup> As the Under Secretary of Commerce for Oceans and Atmosphere, I have been delegated authority to dismiss CZMA appeals for “good cause.” See Department Organization Order 10-15, Section 3.01(u); NOAA Administrative Order 201-104, Section 3.04.

<sup>2</sup> The CZMA regulations provide examples, but not an exhaustive list, of circumstances that can constitute “good cause.” See 15 C.F.R. § 930.129(a) (“Good cause shall include, *but is not limited to*” four listed circumstances) (emphasis added). See Dismissal Letter in Consistency Appeal of Carlos Frontera Colley (Oct. 29, 2004), and Dismissal Letter in Consistency Appeal of John T. Keegan (Dec. 5, 2003) (dismissing appeal because there was no longer an active permit application).

<sup>3</sup> 33 U.S.C. § 1344.

<sup>4</sup> See letter from Ronald A. Krizman, Department of the Army, to Eugene A. Wimpee, June 26, 2003.

<sup>5</sup> See letter from Steve O. Jenkins, Alabama Department of Environmental Management, to U.S. Army Corps of Engineers, June 4, 2003.

<sup>6</sup> See letter from Ronald A. Krizman, Department of the Army, to Eugene A. Wimpee, June 26, 2003.

<sup>7</sup> See letter from Eugene A. Wimpee to Secretary of Commerce, July 24, 2003.

On November 26, 2004, Mr. Wimpee met with State officials to discuss the project. Based on the discussions that took place, the State advised Mr. Wimpee in a letter dated December 6, 2004, that its objection was withdrawn.<sup>8</sup> After consulting with the State, the Corps recommenced processing Mr. Wimpee's permit application. The Corps, however, was unable to obtain sufficient information regarding the purpose and need for the project from Mr. Wimpee: specifically, whether its purpose was to provide access for the harvest of trees, or to provide access to an on-site residential structure that might be built at some point in the future. As a result, on July 28, 2005, the Corps cancelled the permit application and referred the matter to its Enforcement Branch.<sup>9</sup>

### III. Discussion

The procedures governing consistency appeals allow the Secretary of Commerce to find that a federal license or permit activity is consistent with the purposes of the CZMA, notwithstanding a state's objection to that activity. *See* 15 C.F.R. § 930.120. In this case, however, not only has Alabama withdrawn its objection to Mr. Wimpee's project, but the Corps has cancelled Mr. Wimpee's permit application. There is no longer a proposed project to which the State can object, nor is there an objection in place that can be appealed.

### IV. Conclusion

For the foregoing reasons, this appeal is moot and is dismissed for good cause.

Sincerely,



Conrad C. Lautenbacher, Jr.  
Vice Admiral, U.S. Navy (Ret.)  
Under Secretary of Commerce for  
Oceans and Atmosphere

Cc: Chuck Sumner, Mobile District  
U.S. Army Corps of Engineers

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<sup>8</sup> Letter from Steve Jenkins, Alabama Department of Environmental Management, to Eugene A. Wimpee, Dec. 6, 2004.

<sup>9</sup> Letter from Davis L. Findley, Department of the Army, to Eugene A. Wimpee, July 28, 2005.